



Legal Update

November 13, 2014

Based on the totality of the circumstances, police were justified in searching the interior of a vehicle even though police did not recover any weapons from the occupants of a vehicle during a patfrisk.

Commonwealth v Jason Douglas, 86 Mass.App.Ct. 404, (2014)

Background: Police were conducting surveillance outside of the Felt Night Club in Boston because they were concerned that a fight may break out between members of a rival group. Boston police Officers Liam Hawkins (hereinafter referred to as “Office Hawkins” and Mathew Wosny (hereinafter referred to as “Officer Wosny”) were in the area of Felt when they received a radio dispatch that the defendant Jason Douglas (hereinafter referred to as “Douglas”) had left Felt accompanied by two men and appeared agitated. Douglas was punching his own hand and another individual Wayne Steed (hereinafter referred to as “Steed”) was wearing a blue hooded sweatshirt and had one hand held tightly to his body in the front pocket of the sweatshirt. Douglas and Steed were picked up by a woman driving a Toyota Camry. Officer Hawkins stopped the Toyota when the driver failed to use her turn signal. There were four people inside the vehicle. Rheanna Reese was the driver and Douglas was seated in the front passenger seat. Steed and another individual identified as Shakeem Johnson (hereinafter referred to as “Johnson”) were seated in the backseat.

Officer Hawkins had encountered with Douglas more than fifty times with his work though the youth violence strike force. Johnson also had a criminal record involving drug

offenses and other violent crimes and Douglas had a prior criminal record which included at least one firearms conviction. As Officer Wosny approached the vehicle, he observed that Johnson had one arm stretched across the front of his torso near his waist. Officer Hawkins observed that "Johnson was kind of *pivoted to the right* and leaning in towards the middle of the vehicle." Officer Wosny ordered Johnson out of the vehicle and conducted a patfrisk. Nothing was found on Johnson during the patfrisk. Officer Hawkins observed that Steed's hands were on the outside of the pocket of his sweatshirt and it appeared that Steed may have been clutching something in the pocket. Based on Steed's actions and his failure to make eye contact with the officers, Officer Hawkins ordered him out of the vehicle. After three requests, Steed finally got out of the vehicle and the officers recovered nothing on Steed after conducting a patfrisk. While Officer Hawkins was conducting a patfrisk of Steed, Douglas opened the front passenger door and got out of the vehicle. Officer Hawkins testified that Douglas was usually "calm and casual" during prior interactions but that Douglas seemed "different," during this stop. Officer Hawkins referred to Douglas by his first name and ordered him to return to the vehicle. Although Douglas complied, Officer Hawkins observed Douglas shift the vehicle from park into drive and say something to the driver. Officer Hawkins was concerned for his own safety and he ordered Douglas to shift the vehicle back into park. The officers conducted a patfrisk of Douglas and found nothing. Following the patfrisk of Douglas, all four occupants were removed from the vehicle and were either sitting or leaning on the jersey barrier by the road. Officer Hawkins approached the open, front passenger door of the vehicle and he observed a revolver under the front passenger seat where Douglas had been seated. All four occupants of the vehicle were handcuffed and detained. Douglas and Steed were both charged with possession of the firearm.

Conclusion: The Massachusetts Appeals Court reversed the Superior Court judge's findings and denied the motion to suppress. The Appeals Court held that the stop of the vehicle was justified and the police did not exceed the scope of the search when they looked under the passenger's seat before the occupants returned to the vehicle. The key issue on appeal was whether police had reasonable suspicion to search the interior of the vehicle even though police had found nothing after removing each occupant and conducting patfrisks.

1st Issue: Exit Order and Patfrisk

The Court held that the exit order and patfrisk were permissible. During a motor vehicle stop "an exit order is justified where the police have a reasonable belief that the officer's safety, or the safety of others, is in danger." *Commonwealth v. Elysee*, 77 Mass. App. Ct. 833, 840 (2010), quoting from *Commonwealth v. Gonsalves*, 429 Mass. 658, 663 (1999), S.C., 432 Mass. 613 (2000). The officer only needs some "fact or facts in the totality of the circumstances that would create a heightened awareness of danger that would warrant an objectively reasonable officer in securing the scene in a more effective manner by ordering the passenger to alight from

the car." *Commonwealth v. Stampley*, 437 Mass. 323, 326 (2002). "The officer does not need to be absolutely certain that the individual is armed." *Terry v. Ohio*, 392 U.S. 1, 27 (1968). Rather the standard is that "a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." *Ibid.* "The purpose behind the protective measures allowed by *Terry* is to enable an officer to confirm or dispel reasonable suspicions that the stopped suspect may be armed with a weapon" *Commonwealth v. Pagan*, 440 Mass. 62, 68 (2003).

Here the Court found a number of factors that supported conducting a patfrisk of the defendants. First, the officers were conducting surveillance of a celebration for a band that has a rivalry with another group that has a history of violent fights. Second, both officers were familiar with Johnson and Douglas. Douglas had committed a firearms offense in the past and Officer Hawkins testified that he had encountered Douglas over fifty times from his work on the youth violence strike force, a group of Boston police officers engaged in proactive patrol to reduce violence among youthful offenders and young adults and to curb firearm violence in Boston. Officer Hawkins knew Douglas well enough to address him by first name and he knew that Johnson had instances of violence and drug offenses in his criminal record. Aside from their familiarity with Douglas and Johnson, Johnson's movement inside the vehicle was alarming. The officers observed Johnson pivoting and leaning toward the center of the vehicle and holding one arm across his body as if he might be trying to hide something such as a weapon.

The officers also observed another backseat passenger, Steed clutching the pocket of his sweatshirt pocket as if he was holding something. While Steed was seated inside the vehicle, he continued to keep his hands placed on the outside of his sweatshirt pockets and he failed to make eye contact with police. Additionally, police asked Steed *three times* to exit the vehicle. Lastly, Douglas' mannerisms and interaction with the police during the stop were concerning. Douglas got out of the vehicle without being asked to and when he returned to the vehicle, he shifted the vehicle into gear as if to drive away and said something to the driver. Douglas' actions were alarming especially since some of the passengers were standing outside the vehicle and one of the officers was standing between the vehicle and the jersey barrier. Based on all these factors, the Court concluded that the exit order and patfrisk of the individuals within the vehicle were lawful.

2nd Issue: Search of Interior of Vehicle

The second issue that the Court considered was whether the search of the interior of the vehicle was justified after the police failed to recover anything during the patfrisk of all the individuals. "Under the appropriate circumstances a *Terry* type search may extend into the interior of an automobile." *Commonwealth v. Almeida*, 373 Mass. 266, 270 (1977). "The search of the passenger compartment of an automobile, limited to those areas in which a weapon may be placed or hidden, is permissible if the police officer possesses a reasonable belief based on specific and articulable facts which, taken together with the rational inferences from those

facts, reasonably warrant the officer in believing that the suspect is dangerous and the suspect may gain immediate control of weapons." *Michigan v. Long*, 463 U.S. 1032, 1049 (1983), quoting from *Terry v. Ohio*, 392 U.S. at 21.

A patfrisk may legitimately extend into interior of automobile even when patfrisk of the defendant did not reveal weapons and police were prepared to release him, *Commonwealth v. Graham*, 78 Mass. App. Ct. 127, 129 (2010) (justification for patfrisk entitled officer to also conduct protective sweep of vehicle confined in scope to intrusion reasonably designed to discover weapon, where concern extended to threats that might arise from retrieval of weapon in vehicle by occupant who was not placed under arrest); *Commonwealth v. Myers*, 82 Mass. App. Ct. 172, 177-178 (2012)

In the underlying case, the Court found that the circumstances permitted the officers to continue a protective frisk of the vehicle's interior. The reasonable suspicion that the occupants of the vehicle are dangerous and may possess a weapon (although not on their person) **did not** dissipate even though the police did not discover any weapons during the patfrisk of the occupants. The Court emphasized that when Douglas returned to the vehicle and shifted the gear into drive, the safety of the officer was endangered. Douglas' attempt to flee from while leaving his friends behind with officers who knew Douglas' identity, "made it reasonable to suspect that there was something in the car or on his person Douglas did not wish the police to see, most likely a firearm." Indeed if " police officers are required to conclude that the reasonable suspicion that existed before the patfrisk of a person is dispelled by a patfrisk that reveals no weapon and are not permitted a protective frisk of the interior of the vehicle, then, as best expressed by Justice Harlan, 'the answer might be a bullet.'" *Terry v. Ohio*, 392 U.S. at 33.

Commentary: This case emphasizes that the courts are once again examining the "totality of the circumstances" when determining whether an exit order, patfrisk or search of a vehicle are lawful.

For specific guidance on the application of these cases or any law, please consult with your supervisor or your department's legal advisor or prosecutor.